AEGON INSURANCE GROUP (UK) LTD.

v.

DONALDSON & BURKINSHAW

HIGH COURT, SINGAPORE
FA CHUA J
[ORIGINATING SUMMONS NO. 1111 OF 1990]
6 SEPTEMBER 1991

INSURANCE: *Professional indemnity policy - Advocates and solicitors - Excess clause - Right to contribution in respect of fees paid by insurers to solicitors - Whether solicitors were engaged by insured or insurer.*

LEGAL PROFESSION: *Professional indemnity policy - Excess clause - Right of contribution in respect of fees paid by insurers to solicitors - Whether engaged by insured or insurer.*

The defendants, D & B, a firm of advocates and solicitors were at all material times insured by the plaintiffs, AIG, under a professional indemnity policy which provided, *inter alia*, that AIG agreed to indemnify D & B up to a sum of S$500,000 against any claim or claims which may be made against D & B for breach of professional duties as solicitors.

On 21 October 1980 the Portuguese Mission (a former client of D & B) acting through G & Co. put D & B on notice that they intended to make a claim against D & B for professional negligence in connection with D & B's handling of the Portuguese Mission's case for claim for compensation of certain land. D & B, in compliance with the conditions of the policy, gave written notice of the intended claim to AIG's agent in Singapore and enquired whether AIG wished to brief their own solicitors on the intended claim.

On 21 November 1980 HS & Co., a firm of solicitors in England informed D & B that they were instructed by AIG to advise AIG of the validity or otherwise of the intended claim. In the meantime D & B independently retained a solicitor in Singapore who in turn briefed the solicitors and a Queen's Counsel in London.

On 22 October 1981 the Portuguese Mission commenced an action in the High Court against D&B for professional negligence claiming the sum of S$932,342.

HS & Co. retained their own solicitors and instructed Allen & Gledhill who subsequently commenced third party proceedings against G & Co. seeking contribution for their involvement in the situation leading to the said proceedings.

Pursuant to negotiations between the parties in May 1987, the matter was settled and discontinued, each party agreeing to bear its own costs.

AIG now required D & B to contribute a part of the legal fees incurred following the engagement of HS & Co. and Allen & Gledhill and Counsel amounting to S$56,640-70 which they had paid basing their claim on a specific term of the policy.

The issue was whether D & B were required to pay the first $50,000 (in respect of fees paid to Allen & Gledhill) under the policy.

Held:

[1] D & B were contractually bound to allow AIG at any time to take over and conduct in the name of D & B the defence or settlement of any claim. In this case Allen & Gledhill sought instructions from AIG and it was on the instructions of AIG that Allen & Gledhill

commenced the third party proceedings against G & CLC. D & B had no choice in the manner of the appointment of Allen & Gledhill. AIG had expressly reserved to themselves, in the policy, the right to conduct in the name of D & B the defence or settlement of any claim.

[2] Allen & Gledhill were aware that they were AIG's solicitors and they looked to AIG for the payment of their professional fees and disbursements. The costs of Allen & Gledhill are costs payable by AIG, not D & B.

[Plaintiffs' summons dismissed with costs.]

Cases referred to:
Re Crocker [1936] 1 Ch 696 ***(cit)***
Adams v. London Improved Motor Coach Builders, Ltd. [1921] 1 KB 495 ***(dist)***

Other source referred to:
MacGillivray & Parkington on Insurance Law 8th Edn.

For the plaintiffs - Yim Wing Kuen; M/s. Drew & Napier
For the defendants - Jimmy Yap; M/s. Donaldson & Burkinshaw

JUDGMENT

FA Chua J:

By this originating summons the plaintiffs claim *(inter alia)*:

(1) a declaration that the defendants are liable to the plaintiffs in the sum of S$50,000 pursuant to the terms of the Professional Indemnity Policy No. CA 40548 read with the renewal policies and the endorsements thereon or alternatively, pursuant to the plaintiffs' payment of solicitors' and Counsel's fees for and on behalf of the defendants and/or at the defendants' request and/or by the defendants' authority and/or with the defendants' undertaking to repay the said sum to the plaintiffs;

(2) payment by the defendants of the sum of S$50,000 to the plaintiffs.

The defendants, a firm of advocates & solicitors in Singapore, were at all material times insured by the plaintiffs under a Professional Indemnity Policy No. CA 40548 (the Policy) which provided, *inter alia*, that the plaintiffs agreed to indemnify the defendants up to a sum of S$500,000 against any claim or claims which may be made against the defendants for breach of professional duties as solicitors.

The Portuguese Mission, a former client of the defendants, had a valuable piece of land at Raffles Place, Singapore, on which stood a well known department store known as Robinsons. On 21 November 1972, Robinsons was destroyed by fire. In due course the Singapore Government gave notice under s. 5 of the Land Acquisition Act of its intention to compulsorily acquire the land from the Portuguese Mission. In accordance with the provisions of the Act the Portuguese Mission applied for, and were awarded, compensation. The defendants advised the Portuguese Mission in connection with their claim for compensation.

On or about 21 October 1980, the Portuguese Mission acting by Godwin & Co. put the defendants on notice that they intended to make a claim against the defendants for professional negligence in connection with their handling of the Portuguese Mission's claim for compensation.

On 22 October 1980, acting in compliance with the conditions of the policy, the defendants gave written notice of the intended claim to the plaintiffs' agent in Singapore and enquired if the plaintiffs would wish to brief their own solicitors on the intended claim (HMD2).

By a letter dated 21 November 1980, Herbert Smith & Co. (a firm of solicitors in England) informed the defendants that they were instructed by the plaintiffs to advise them (the plaintiffs) on the validity or otherwise of the intended claim (HMD3).

In the meanwhile the defendants independently retained Mr. L.A.J. Smith, a solicitor in Singapore, who in turn briefed solicitors in London and Mr. Anthony Scrivener QC for advice.

On 22 October 1981, the Portuguese Mission took out an action in the Singapore High Court in Suit No.3902 of 1981 against the defendants for professional negligence arising from the latter's advice to the former in connection with the said claim for compensation from the Government, and claiming, *inter alia*, the sum of $932,342 from the defendants on the basis that as a result of the defendants' negligence the Portuguese Mission received an amount of compensation lower than that which they were properly entitled.

By a telex dated 22 October 1981, the defendants informed Herbert Smith & Co. of the said proceedings and asked whether the plaintiffs wished to appoint solicitors in Singapore to act on behalf of the defendants or whether it would be in order for the defendants to engage solicitors of their choice to act on behalf of the defendants (HMD4).

By a telex dated 23 October 1981, Herbert Smith & Co informed the defendants that plaintiffs wished to retain their own solicitors and proposed to instruct Allen & Gledhill (HMD5).

By a letter dated 10 September 1982, Allen & Gledhill intimated to Herbert Smith & Co. that "it would be useful if we could have a formal opinion from Counsel so that we may see whether his views are in accordance with our own views and, in particular, if his views would differ in any significant aspect from those expressed by Mr Anthony Scrivener QC" (HMD6).

By a telex dated 12 January 1983, Herbert Smith & Co. asked Allen & Gledhill whether there was a possibility of seeking contribution from Godwin & Co. for their (Godwin & Co.) involvement in the situation leading to the said proceedings. Allen & Gledhill replied *via* a telex on 13 January 1983, stating, *inter alia*, that any decision to join Godwin & Co. as third parties would have to depend on Counsel's view. By a letter dated 20 May 1983, Herbert Smith & Co. informed Allen & Gledhill that Counsel's view was that "the defendant's were not negligent but even if they were then, in all probability, the position could and should have been retrieved by Messrs Godwin & Co. after they took over the case on 1 January 1980. Accordingly Counsel agrees with me that a third party notice should be issued and I should be obliged if you could proceed accordingly" (HMD6). In the event Allen & Gledhill commenced third party proceedings against Godwin & Co.

Sometime in May 1987 two representatives of the plaintiffs called on Mr. H.M. Dyne, a partner in the defendants' firm, and asked whether these proceedings could be discontinued against the defendants, with each party bearing its own legal costs. Mr. Dyne reported the matter to Allen & Gledhill *via* a fax transmission dated 5 May 1987, and requested them to find out whether Herbert Smith & Co. were prepared to agree to a discontinuance of these proceedings on the basis of each party paying its own costs. By a fax dated 8 June 1987, Herbert Smith & Co. informed Allen & Gledhill that the plaintiffs agreed to a settlement on the basis that these proceedings (including the third party proceedings against Godwin & Co.) be discontinued with each of the parties bearing its own costs (HMD7).

By an order of court dated 1 October 1987, the plaintiffs' claim against the defendants was wholly discontinued upon these terms:

(a) the plaintiff will not in the future bring any further proceedings against the defendants (or any of them) in respect of the matters which are the subject of this action;

(b) there be no order as to the costs of this action.

And the defendants' claim against the third party was wholly discontinued upon similar terms.

The defendants paid the legal expenses which they had incurred when they retained Mr. L.A.J. Smith who in turn briefed solicitors and Counsel in London to advise the defendants.

The defendants did not make any claim for any indemnity under the policy issued by the plaintiffs. The plaintiffs, however, required the defendants to contribute a part of the legal fees incurred following the engagement of Herbert Smith & Co. and Allen & Gledhill and Counsel amounting to $56,640.70 which they had paid.

The relevant term of the Policy is Memorandum Number 1 which reads:

> It is hereby understood and agreed that in respect of each claim made against the insured the amount of Singapore $50,000, which amount shall be inclusive of costs and expenses, shall be borne by their insured and their own risk and the company shall only be liable to indemnify the insured in excess of such amounts.

The question for decision is whether the defendants are required to pay the first $50,000 under the policy.

The submission of Counsel for the plaintiffs is this:

(a) Allen & Gledhill were appointed by the plaintiffs with the consent on ratification of the defendants in the defence of the Suit No.3902 of 1981 and they were solicitors acting for and on behalf of the defendants. Counsel cited *MacGillivray & Parkington on Insurance Law* 8th Edn. where the following passage appears (para. 2006):

> If the insurers assume the conduct of the defence of an action brought against the assured and appoint solicitors to act therein, the solicitors so appointed are the solicitors of the assured ...

Counsel also cited *Re Crocker* [1936] 1 Ch 696, the headnotes of the case reads:

> Where an action for damages for negligence arising out of an accident is conducted on the defendant's behalf by his insurance company, and solicitors are nominated by the company, under a clause in the policy to that effect, the company only act as the defendant's agents, and the solicitors are throughout solicitors for the defendant.

The memorandum of appearance was entered by Allen & Gledhill for the defendants in Suit No. 3902 of 1981. Allen & Gledhill then took instructions from Herbert Smith & Co. and the defendants directly. The defendants also admitted that Allen & Gledhill were their solicitors in their letter dated 5 May 1987, to Allen & Gledhill (HMD7).

(b) Theoretically, the defendants were liable to Allen & Gledhill for their fees. In support of this submission Counsel cited the case of *Adams v. London Improved Motor Coach Builders Ltd* [1921] 1 KB 495). In that case the plaintiff was a member of the National Union of Clerks, a trade union, having amongst other objects that of providing legal aid for members in connection with their employment. According to the usual practice, the plaintiff laid his claim against his employers, the defendants, for wrongful dismissal before the Executive Council of the Union and they decided that he was entitled to legal aid and instructed a firm of solicitors, who were the general solicitors to the Union, to act for him in the matter. The plaintiff gave no written retainer to the solicitors. There was no agreement with the solicitors that the plaintiff was not to be liable to them for

their costs. They issued a writ on his behalf and conducted the action to trial, instructing Counsel on his behalf during the preliminary stages and at the trial. The plaintiff recovered judgement against the defendants. An adjournment then took place for evidence and further argument upon the question whether the plaintiff was entitled to costs. It was held that the plaintiff was entitled to judgement with costs.

(c) The professional fees and disbursements of Allen & Gledhill amounting to $56,641 were paid by the plaintiffs for and on behalf of the defendants. It is not prejudicial to the plaintiffs' case that Allen & Gledhill were in fact paid by the plaintiffs first.

In *Adams v. London Improved Motor Coach Builders Ltd.* Banks LJ in his judgment said (pp. 499-501):

> The principle upon which costs as between party and party are allowed is that the costs are awarded to the person claiming them as an indemnity. That being the principle, it follows that any one who is not in a position to claim to be indemnified is not entitled to an order for party and party costs. It is said here that the plaintiff was not in a position to claim an indemnity, for two reasons, as I understand: one is that the firm who purported to act as his solicitors were not his solicitors at all; that they were the solicitors for the Union, and their only instructions were to act as solicitors for the Union. The other is that, assuming the Union instructed the solicitors to act as solicitors for the plaintiff, yet it was upon the terms that the solicitors should look solely to the Union, and not to the plaintiff, for payment of their costs. Sankey J held that neither contention was well founded upon the facts. He came to the conclusion that the solicitors were engaged to act as solicitors for the plaintiff by the union, and that in so engaging the solicitors, the Union were acting as the agents of the plaintiff. In my opinion that view is correct. The learned Judge also found that there had been no arrangement either by the union or by the solicitors or by the plaintiff, that the solicitors should not, under any circumstances, look to the plaintiff for payment of their costs. With that conclusion upon the facts I also agree.
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> I arrive at my opinion by these steps:
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> First, who engaged the solicitors? The answer is the union. Next, for whom did the union engage the solicitors to act? As solicitors for the union or as solicitors for the plaintiff? It seems to me to be impossible on the facts to come to any other conclusion than that the union engaged the solicitors to act in the matter as solicitors for the plaintiff. The solicitors issued the writ, and they made the statement in the indorsement that they did so as solicitors for the plaintiff. When Mr. Evershed, a member of the firm of Helliwell, Harby & Evershed, who issued the writ, was called, the defendants, who were asserting that it was a misstatement, and that his firm were not acting as solicitors for the plaintiff, but for the Union, did not ask him a single question on the subject. Nor was the plaintiff asked whether the solicitors were acting as his solicitors or not. It seems to me, upon those facts, only one conclusion is possible - namely, that the solicitors were engaged to act as solicitors for the plaintiff.
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> The next question is, upon what terms were they employed? Both the plaintiff and Mr. Evershed were asked some questions about that. But if, as I think, it is essential for the defendants' case that they should establish that the terms upon which the solicitors were engaged included the term that under no circumstances should they look to the plaintiff, it seems to me that the evidence falls entirely short of what was necessary to establish that case. [The Lord Justice referred to the evidence]. When once it is established that the solicitors were acting for the plaintiff with his knowledge and assent, it seems to me that he became liable to the solicitors for costs, and that liability would not be excluded merely because the Union also undertook to pay the costs. It is necessary to go a step further and prove that there was a bargain, either between the Union and the solicitors, or between

> the plaintiff and the solicitors, that under no circumstances was the plaintiff to be liable for costs. In my opinion the evidence falls short of establishing that necessary fact, without which the defendants are not entitled to succeed. On these grounds I think that the learned Judge's decision was right.

Atkin LJ in his judgment said (pp. 501-502):

> I agree. The plaintiff brought an action against his employers to recover damages for wrongful dismissal. In that action he was represented by a firm of solicitors who acted for him throughout. The case was brought to trial and judgment given for the plaintiff. It was then suggested that the learned Judge ought not to give the plaintiff his costs because it was said that he was under no liability to the solicitors in the action to pay those costs. In order to make good that contention, the plaintiff must show either that there was no employment by him of the solicitors in the action, so that they were not his solicitors, or that, if there was such an employment, he had made a binding agreement with them, express or implied, that he was not to pay any costs. The question is whether the defendants have established either of those propositions.

Adams v. London Improved Motor Coach Builders was decided on the facts of the case.

What are the facts in the present case?

The defendants were contractually bound to allow the plaintiff insurers at any time to take over and conduct in the name of the defendants the defence or settlement of any claim.

By their letter of 22 October 1980, to the plaintiffs' agent in Singapore the defendants asked whether the plaintiffs would want to engage their own solicitors on the intended claim of Portuguese Mission. The defendants were informed in November 1980 by Herbert Smith & Co. that they were instructed by the plaintiffs to advise the plaintiffs on the validity or otherwise of the intended claim of the Portuguese Mission.

In the meanwhile the defendants in 1980 independently retained the late Mr. L.A.J. Smith to advise them.

When action was commenced by the Portuguese Mission in October 1981, the defendants informed Herbert Smith of the proceedings and asked whether the plaintiffs would want to appoint solicitors in Singapore to act on behalf of the defendants or whether it would be in order for the defendants to engage solicitors of their choice to act on behalf of the defendants. Herbert Smith & Co. informed the defendants that the plaintiffs wished to retain their own solicitors and proposed to instruct Allen & Gledhill.

It is not correct for Mr. Yim, Counsel for the plaintiffs, to say that Allen & Gledhill took instructions from both Herbert Smith & Co and the defendants. The evidence is that Allen & Gledhill sought instructions from the plaintiffs and it was on the instructions of the plaintiffs that Allen & Gledhill commenced the third party proceedings against Godwin & Co.

It is also not correct for Mr. Yim to say that Allen & Gledhill were appointed by the plaintiffs with the consent or ratification of the defendants. The defendants had no choice in the matter. The defendants were contractually bound to allow the plaintiffs to conduct the defence and to appoint solicitors of their choice to do so. The plaintiffs in appointing Allen & Gledhill were not acting as the agents of the defendants. The evidence is clear that the plaintiffs appointed Allen & Gledhill to defend the claim on their own behalf. The plaintiffs have expressly reserved to themselves, in the policy, the right to conduct in the name of the defendants the defence or settlement of any claim. I am unable to accept Mr. Yim's submission

that the appointment of Allen & Gledhill was only a procedural right.

Allen & Gledhill were aware that they were plaintiffs' solicitors and they looked to the plaintiffs for the payment of their professional fees and disbursements.

I have no hesitation in finding on the facts that the costs of Allen & Gledhill are costs payable by the plaintiffs and not the defendants.

The plaintiffs' summons is dismissed with costs.

Also found at [1991] 3 CLJ 2608